IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1564

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Petitioners,

against

GUSTAVE ZURAK, WILLIAM MCAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit entered on February 7, 1977 (*Van Graafeiland*, C.J., dissenting).

Opinion Below

The opinion of the court below is reported at 550 F. 2d 86 (2d Cir. 1977) . It is appended *infra* as Appendix A. The opinion of the United States District Court for the Southern District of New York is appended *infra* as Appendix B.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was entered on February 7, 1977. A motion for rehearing by respondents was denied on March 25, 1977.

Statute

New York Penal Law Section 70.40(2)

2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board in accordance with the provisions of the correction law.

Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

Questions Presented

1. Whether due process attaches to conditional release where inmates at regional and county correctional facilities have no expectation under state law that they will be conditionally released prior to the expiration of their jail term?

2. Whether due process requires that a conditional release application be processed within 60 to 90 days of an inmate's receipt at local detention and in a particular order where such requirements are contrary to state statute and interfere with the state administration of the conditional release program.

3. Whether the Court properly ordered that a denial or deferral of conditional release be accompanied by a statement of reasons and facts when due process imposes no such requirement on the Board of Parole even though the evidence established that statements of reason were being provided.

Statement of the Case

Plaintiffs were inmates of the New York City Correctional Institution for Men (hereinafter Rikers Island). All were serving definite sentences of one year or less under New York law.* Pursuant to New York Penal Law

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* A definite sentence under New York Law never exceeds one year. All misdemeanors carry definite terms of imprisonment of one year or less. New York Correction Law § 70.15. Additionally Class D and E felons may receive a definite term of imprisonment of one year. New York Penal Law § 70.00(4).

(footnote continued on the following page)

§ 70.40(2), inmates sentenced to definite terms of 90 days or more are eligible for a form of parole known as conditional release after service of at least 60 days of such term.* If released, an individual remains under the supervision of the Parole Board for a period of one year. In computing service of sixty days, the credit allowed for jail time under New York Penal Law 70.30(3) is considered time served.

Plaintiffs alleged that they had all applied for conditional release; that under state statute they were eligible for conditional release after service of sixty days of their sentence; that they did not receive a decision on their applications for conditional release by the sixtieth day of their term and that this was a violation of their constitutional due process rights. They further alleged that due process entitled them to a statement of reasons when conditional release was denied and a description of the evidence relied upon by the Parole Board in denying their application.** They sought to proceed as a class representing all

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(footnote continued from preceding page)

Sentences in excess of one year may only be imposed for felonies and are classified as indeterminate sentences for which the minimum period of imprisonment is three years, the maximum, life. New York Penal Law § 70.00. An indeterminate sentence of imprisonment must be served at a state correctional facility; a definite sentence of imprisonment, i.e., a term of one year or less is served at a county or regional correctional institution. New York Penal Law § 70.20.

* This type of release is to be distinguished from release pursuant to New York Penal Law § 70.30(4) by which inmates may reduce their term of imprisonment by one-third for good behavior discussed in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

** Under New York Law, felons serving terms of three years or more meet personally with three members of the Parole Board. New York Correction Law § 214. Plaintiffs sought a holding that they were also entitled to meet with the parole commissioner who rules on their conditional release application. The Circuit Court reversed the district court's holding that plaintiffs were constitutionally entitled to meet with a commissioner.

inmates who are or will be incarcerated in New York City detention and correctional facilities who are or will be eligible for conditional release pursuant to New York Penal Law § 70.40(2). Jurisdiction was predicated on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

The district court held an evidentiary hearing on plaintiffs' application for a preliminary injunction. Lawrence Kavanaugh, Assistant Director of Field Operations, Division of Parole, and Raymond Dorsey, Supervising officer, Division of Parole at the New York City Correctional Institution for Men, described the administration of the state's conditional release program for inmates serving definite terms of one year or less at county or regional correctional institutions. Upon receipt at a county or regional correctional facility an inmate is informed that, if he has a term of ninety days or longer, he will become eligible for conditional release. If an inmate wants to apply for the program,* he signs an application form. Thereafter, a parole officer interviews him, investigates his background and prepares a report for the Parole Board based on his prior criminal record, present offense, family history, community attitude, and parole program if released. The probation report that was prepared at the time of sentencing is usually submitted to the Board.** The applicant may submit any letters or documents to the Board that he believes will enhance his chances for conditional release.

The file goes to one parole commissioner who renders the decision. As of August, 1975, applicants are given a statement of the reasons in writing if conditional release is

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* Not all inmates apply for the program since they will have to serve one year under supervision if conditional release is granted and they may have only a short period of time left to serve at the correctional institution.

** Outside of New York City, an independent investigation of the information supplied by the applicant is conducted. Because of staff limitations, this is not done in New York City.

denied or a decision is deferred to a later date. An applicant may apply to the chairman of the Board for reconsideration.

An investigation into an applicant's background cannot always be completed within 60 days. Sometimes the investigation is difficult. Additionally, an applicant applying for the program may have a great deal of jail time so that the Parole Board cannot possibly gather the necessary information and act on his application within 60 days. The Board cannot begin an investigation until the application is received, and of course, until sentence is imposed, there is no way of knowing if a person will receive a term in excess of ninety days so that he is eligible for the program. In 1974, statewide applications for conditional release numbered 2,578.

Dorsey explained the particular problems he faces at Rikers Island. Six parole officers service the five institutions on Rikers Island. There are approximately 3,000 inmates eligible to apply for conditional release each year. Although the inmates are usually brought to the Parole Officers for their interviews, at times the officers must travel from one institution to another by a bus which only runs at set intervals. Moreover, the Board has no control over the movement of inmates on Rikers Island. This is done by City, not State, Correctional employees. In addition to servicing the institutions on Rikers Island, the parole officers assigned there must interview inmates at the Bronx House of Detention for Men, the Queens House of Detention for Men, the Brooklyn House of Detention for Men, various residential treatment centers and Bellevue and Kings County Hospitals.

Opinions Below

The district court observed that it is settled in the Second Circuit that a prisoner's interest in prospective parole must be accorded due process protection. While

recognizing that New York Penal Law permits the Parole Board to consider conditional release applications *any time* after service of sixty days, the district court, nonetheless, went on to hold that as a matter of due process of law, applications must be processed within 60 to 90 days of an inmate's arrival at Rikers Island. The court further held that the Board must institute appropriate procedures that will *insure* that conditional release applications be processed within this period and in order of eligibility notwithstanding any difficulties in investigating an applicant's background, tardy applications and shortened periods for investigation by reason of extended jail time credits.

Finally the district court held as a matter of due process that inmates whose applications are denied or deferred are entitled to a written statement of reasons together with a written statement of the facts relied on by the Board in reaching its decision notwithstanding testimony that reasons were already being supplied to the applicants.

The Circuit Court affirmed this holding (VAN GRAAFEILAND, J. dissenting).* The majority held that a prisoner's interest in conditional release is sufficient to warrant due process protection. The Court stated that New York Penal Law § 70.40(2) provides inmates a "justifiable expectation rooted in state law" that they will be released if they meet Board standards. The Court observed that it is the nature of the interest sought to be protected that determines whether due process attaches. The Court found the interest at bar, characterized as conditional freedom versus incarceration, to be of such a nature that due process attaches to the conditional release decision.

The Court affirmed the district court's holding that *as a matter of due process* an inmate is entitled to a decision on

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* In so doing, the Circuit Court rejected petitioners' argument that the action was mooted since all respondents had been released prior to the certification of the class by the District Court.

his conditional release application within 60 to 90 days of his receipt at Rikers Island. The Court also agreed with the district court's determination that applications must be processed in order of eligibility. Recognizing, however, the problems inherent in such a holding, the Circuit Court added that the District Court did not really mean that strict order of eligibility had to be maintained since the state authorities are in the best position to deal with problems as they come up. "This Court simply cannot predict all the difficulties yet to be encountered and shape its order accordingly . . .".

Finally, the Circuit Court stated that it had no difficulty with the district court requirement of a statement of reasons and facts [notwithstanding testimony that reasons were already being supplied].

Judge Van Graafeiland, in a vigorous dissent, disagreed with so much of the majority decision that required "the State to institute procedures to 'insure' that conditional release applications be processed in order of eligibility and mandated that they be processed within 60-90 days of the arrival of an inmate on Rikers Island". He observed that the district judge had elevated the petty to constitutional status, creating another procedural morass for already beleaguered prison officials and created further inequities in the process. Judge Van Graafeiland pointed out that a plan is not fair which requires a prompt applicant to sit by and wait until the application of a less diligent inmate, albeit of earlier eligibility, is passed upon by the Board. A procedure is also not fair where an untroublesome application may not be passed upon until a more difficult one is completed.

Insofar as the majority construed the district court opinion as if it did not contain the word *insure* that applications be processed in strict order of eligibility, Judge Van Graafeiland observed that this "merely substitutes one unfortunate consequence of unnecessary federal interference for another" and reiterated his concern about excessive involvement by the federal courts in the operation of state penal institutions.

ARGUMENT

This petition presents substantial questions of law requiring reversal by this Court of the decision below.

A. Conditional Release is not an interest to which due process applies.

In an effort to meddle into matters particularly within the concern of the New York State Department of Corrections, Division of Parole, the Circuit Court has held that conditional release is an interest to which due process attaches. However, its analysis of an inmate's right to conditional release under New York Law is plainly erroneous. There is no right under the constitution to conditional release any more than to parole. The prisoner's only right as respects imprisonment is not to be confined beyond the sentence imposed by the court. *Marshall* v. *United States,* 414 U.S. 417 (1974).

For the same reasons that this Court indicated when it took jurisdiction of the appeal in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F.2d 928 (2d Cir.) *vacated and remanded as moot sub nom. Regan* v. *Johnson,* 419 U.S. 1015 (1974), the rationale of the majority here is unfounded. The majority itself notes that the circuits are in conflict (App. 9a, fn.). Yet the cited case is referred to all through the majority opinion as if it were the law.

Citing New York Correction Law § 827 to buttress its view, the Circuit Court majority states that New York Penal Law § 70.40(2) provides inmates a "justifiable expectation rooted in state law" that they will be conditionally released if they meet Parole Board standards.

This is incorrect. Section 827 justifies no such expectation. On the contrary, Section 827 makes clear as a bell that conditional release is in the sole discretion of the New York Board of Parole. Section 827(1) provides "[C]onditional release of persons eligible for such release under definite sentences of imprisonment . . . shall be within the *discretion* of the board of parole . . .". This discretion is not subject to Court review and the Board is not required to release individuals on the basis of any particular state of facts. *Matter of Briguglio* v. *New York State Bd. of Parole,* 24 NY 2d 21 (1969).

Although quoting authority that it is the *nature* of an interest sought to be protected that determines whether due process attaches, the Court shows itself completely unaware of what this authority means since it goes on to conclude, "[w]hether labelled 'conditional release' or 'parole' the nature of the interest at stake in this case is the same: conditional freedom versus incarceration."

But that is not the *nature* of the interest, it is the *weight,* i.e., the importance of that interest to a particular individual. The nature of an interest for due process purposes can only be determined by reference to state law. New York gives an incarcerated individual no statutory right to be a parolee or a conditional releasee. As in *Montanye* v. *Haymes,* 427 U.S. 236, 243 (1976), "The statute imposes no conditions on the discretionary power . . ." of the Parole Board. In short, due process does not attach to the conditional release decision.

> ". . . [G]iven a valid conviction the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as

> the conditions of confinement do not otherwise violate the Constitution." *Meachum* v. *Fano,* 427 U.S. 215, 244 (1976).

The contrary holding of the Circuit Court is in conflict with the case law of this Court. Moreover, as the majority opinion concedes, Circuits other than the Second Circuit are continuing to misapply the teaching of *Meacham* and *Montanye* to the parole process, resulting in a conflict in the Circuits on this issue. *Compare,* for example, *Brown* v. *Lundgren,* 528 F.2d 1050 (5th Cir. 1976), *cert. denied,* 45 USLW 3329 (U.S. Nov. 2, 1976), *with Bradford* v. *Weinstein,* 519 F.2d 728 (4th Cir. 1975), *cert. granted,* 421 U.S. 998 (1975), *vacated and remanded as moot,* 44 USLW 3372 (U.S. Dec. 23, 1975).

This case accordingly raises important questions for the administration of criminal justice which should be reviewed by this Court as the majority opinion appears to acknowledge.

B. The timing of a conditional release decision can only be determined by reference to state law.

Having determined that due process attaches to the conditional release decision, the Circuit Court affirmed the district court's holding that *due process* requires that applications be processed within 60 to 90 days of an inmate's arrival at Rikers Island despite the acknowledgment in the district court opinion that this is contrary to the New York statute (App. 28a-29a).

The courts below imported the notion that the application must be considered within a time limitation and in a particular order as a matter of constitutional due process. However the failure to consider such an application at a given time or in a given order cannot be held to constitute a deprivation of due process in a constitutional sense. The timing of conditional release can never be

determined by due process but must be established by State law itself. New York has simply legislated that *after* sixty days, the Parole Board *may* release an inmate from county or regional detention. Under the statute it is clear that the Board and the staff under its supervision do not have to act on any application at any particular time or in any particular order. The New York legislature contemplated no such conditions. It thus provided that jail time would be credited toward service of the sixty days necessary for consideration for conditional release. Under this statutory scheme, it would be impossible to process an application by the sixtieth day or in order of eligibility, since until sentencing the Board does not know if an individual is eligible for the program, let alone desires to participate in it. Also, in not mandating a decision by a particular date or in a set order the legislature recognized the difficulties in obtaining the necessary information to process some applications.

By affirming the district court order that applications be processed within 60 to 90 days of an inmate's arrival at Rikers Island and in order of eligibility, the Circuit Court substituted itself for the State's legislature and, as we have pointed out, intruded on matters particularly within the concern of the Board, placing the Federal Court astride the day to day operations of the prisons. "[F]ederal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States". *Meachum* v. *Fano, supra,* 229.

Finally, the petitioners dispute that due process constitutionally requires that applicants be given a statement of reasons and the facts underlying such reasons when conditional release is denied or deferred. The defendants were and are supplying written reasons for denial or deferral to applicants. This requirement by the Court is a consequence of its view of the treatment of parole ap-

plications as indicated by *U.S. ex rel. Johnson* v. *Chairman, New York State Board of Parole, supra.* The importation of such a constitutional requirement is without any basis and should also be overturned.

CONCLUSION

The Court should note probable jurisdiction and summarily reverse the decision below or, in the alternative, should grant plenary consideration to the instant appeal.

Dated: New York, New York
May 6, 1977

Respectfully submitted,

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APPENDIX A

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 425—September Term, 1976.

(Argued October 29, 1976 Decided February 7, 1977.)

Docket No. 76-2100

GUSTAVE ZURAK, WILLIAM MCAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v—

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Defendants-Appellants.

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from an injunction issued in the Southern District in which Judge Carter found that due process requires that defendants-appellants: (1) process applica-

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* Of the Southern District of New York, sitting by designation.

tions for conditional release from the New York City Correctional Institution for Men, Rikers Island in order of eligibility and within 60-90 days of an inmate's arrival at Rikers Island; (2) provide written statements of reasons and facts to inmates whose applications for conditional release are denied or deferred; and (3) accord each applicant an opportunity for a personal appearance before a commissioner of the Board of Parole.

Affirmed except as it requires appellants to provide a personal appearance.

GORDON J. JOHNSON, Esq., The Legal Aid Society, New York, N.Y. (Natalie J. Kaplan, William E. Hellerstein and Donald H. Zuckerman, Attorneys, The Legal Aid Society, New York, N.Y., on the brief), *for Appellees.*

ARLENE R. SILVERMAN, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, First Assistant Attorney General, State of New York, on the brief), *for Appellants.*

LUMBARD, *Circuit Judge:*

Defendants-appellants, members of the New York State Board of Parole (hereinafter "the Board") and state correctional services officials, appeal from an injunction issued in the Southern District, dated July 30, 1976, upon findings by Judge Carter that due process requires that defendants: (1) institute procedures to ensure that applications for conditional release from the New York City Correctional Institution for Men, Rikers Island, are proc-

essed in order of eligibility and within 60-90 days of the applicant's arrival at Rikers Island; (2) provide each inmate whose application for conditional release is denied or deferred a written statement of the reasons for the Board's action together with the facts relied upon in reaching the decision; and (3) accord to each applicant the opportunity for a personal appearance before the Board commissioner or commissioners responsible for determining the disposition of the application. Appellants contend that the inmates' interest in conditional release is not sufficient to make their claims cognizable under the Due Process Clause; further, they argue that in any event due process does not require the procedures ordered by the district court. We reverse so much of the district court's injunction which mandates an opportunity for personal appearance before a member of the Board and affirm the remainder.

Under New York Penal Law § 70.40(2)[1] individuals, such as were the appellees, serving one or more definite sentences of imprisonment with an aggregate term in excess

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[1] Section 70.40(2) provides as follows:

2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board, in accordance with the provisions of the correction law.

Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

of 90 days may request conditional release from custody at any time after the service of 60 days; release is at the discretion of the Board and is probationary for one year. "Definite sentences" under New York law never exceed one year, New York Penal Law §§ 70.00(4), 70.15(1), although a person sentenced to two or more definite sentences may be required to serve an aggregate term of up to two years.[2] New York Penal Law § 70.30(2)(b). Definite sentences may be imposed for certain misdemeanors and certain low-grade felonies. See New York Penal Law §§ 70.15, 70.00(4). In contrast, sentences of more than one year are indeterminate and may be imposed only for crimes classified as felonies. New York law requires that the term of an indeterminate sentence be at least three years and provides that it may be for as long as life for certain crimes. See New York Penal Law § 70.00. An individual sentenced to an indeterminate term is eligible for parole after having served a minimum period of imprisonment (as fixed by the sentencing court, or, in certain cases, the Board), which must be at least one year and may be as long as 25 years. New York Penal Law § 70.00(3). Definite sentences are served in a county or regional correctional institution; indeterminate sentences must be served in a state prison. New York Penal Law § 70.20. Under New York Correctional Law § 214 applicants for parole, but not for conditional release, are entitled to a personal appearance before a three-member panel of the Board and a written statement of reasons and facts relied upon if parole is denied. Appellees argued before the district court that the lack of such procedures in the case of conditional release applications violates both due process and equal protection and sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

[2] The term of a definite sentence is credited with any time spent in custody prior to the commencement of the sentence as a result of the charge that culminated in the sentence. The credit is referred to as "jail time." New York Penal Law § 70.30(3). In addition, the term of a definite sentence may be significantly shortened through the use of good time credits. See New York Penal Law § 70.30(4).

Plaintiffs were all inmates serving definite sentences of more than 90 days at Rikers Island.[3] In its unreported decision of July 30, 1976, the district court granted plaintiffs' motion to proceed as a class pursuant to F.R.C.P. 23(b)(2), which was unopposed; the class consists of all inmates on Rikers Island who are or will become eligible for conditional release.[4]

The operation of the conditional release program was described at trial. Raymond Dorsey, the official supervising the Rikers Island conditional release program, testified that he and his staff attempt to explain the program to all eligible inmates within the first week of their arrival. Parole officers then interview those who wish to apply. There are no written guidelines on how these interviews are to be conducted. There are no established practices determining the order in which arriving applicants are to be interviewed;[5] rather, the district court found that the interviews are conducted on a randum basis without regard

[3] The named plaintiffs have all been released from custody. See discussion in text, infra.

[4] The district court record shows that on October 26, 1976 the district court granted plaintiffs-appellees' post-trial motion to amend the definition of the class to include inmates serviced by the Rikers Island parole staff who are transferred from Rikers Island to participate in certain programs in other parts of New York City. This amendment, which increases the size of the class by approximately 100 to 200 inmates, apparently went unopposed; accordingly, this court's opinion should be taken to refer to the class as amended.

[5] The district court found the operation of the program to be "chaotic." For example, witness Maitland Jones testified that he was sentenced to a one year term on April 18, 1975 and arrived at Rikers Island on April 23. Jones stated that although he had applied for conditional release shortly after his arrival, he had not yet received an interview as of the date of his testimony, December 22, 1975. Appellees Zurak, Zambuto and Mack testified that a period of three to four months passed before they learned their

to the amount of jail time served.[6] During the interview the parole officer asks the inmate certain questions and takes down any information the inmate wishes to provide; the inmate is also advised that letters in his behalf or job offers may be sent to the parole officer to be included in the inmate's file.

Based on the interview and the inmate's file the parole officer prepares a written report, which is placed in the inmate's file. The report includes a personal and social history of the inmate based upon the interview and information contained in available presentence reports. The parole officer makes no independent investigation and although he simetimes makes a recommendation, the conditional release decision is ordinarily left entirely to the discretion of a Board commissioner. The district court found that under existing conditions, it customarily takes 60 to 90 days for parole officers to submit their reports to the Board.

The commissioner's decision is based entirely on the information contained in the inmate's file, including the parole officer's report and the presentence report; the commissioner neither interviews the inmate nor consults with the parole officer who conducted the interview. Inmates are not allowed to see their files. There are no written criteria

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applications had been denied. Appellee Santiago testified that although he arrived at Rikers Island on June 30, 1975, after repeated efforts to contact a parole officer he was unable to obtain an interview until November 16; as of December 22, 1975 Santiago, who was serving a one year term, had yet to hear from the Board. Appellee Halpern testified that he arrived at Rikers Island on April 30, 1975 and immediately applied for conditional release. Halpern stated that he was not interviewed until the end of August. Halpern's release was deferred until November and granted December 1, 1975; however, Halpern stated that he refused conditional release because he had only 75 days left in his term and he preferred to serve this time rather than face a year-long probation.

[6] New York Penal Law § 70.40(2) provides that jail time is to be treated as time served in computing the 60-day period. See notes 1 and 2, supra.

upon which the commissioners base their decisions, although the testimony at trial indicated that they are primarily influenced by the applicant's prior record, the nature of his offense, the applicant's institutional adjustment and his future plans.[7] In September, 1975 the Board began to provide written statements of reasons and facts to inmates whose applications had been denied; prior to that time the Board's practice was merely to deny or defer an application without any statement. An inmate whose application has been denied may apply to the chairman of the Board for reconsideration.[8]

Before proceeding to the merits, we treat an initial issue regarding this court's jurisdiction. At oral argument appellants pointed out that by some time after the evidentiary hearing but prior to the district court's certification of the class in its order of July 30, 1976, all of the named plaintiffs had been released; accordingly, appellants now contend that the controversy is moot. We reject this contention. Although a litigant must ordinarily be a member of the class that he seeks to represent at the time the class is

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[7] In *Haymes* v. *Regan*, 525 F2d 540 (2d Cir. 1975), we held that, at least where meaningful statements of reasons and facts are provided, it is not necessary for the Board to promulgate and disclose formal rules regarding release criteria for parole. It appears that under New York law, application for parole and conditional release are evaluated under the same standards. See New York Correction Law §§ 213, 827; New York Penal Law § 70.40 (2). See also *United States ex rel. Johnson* v. *Chairman, N.Y. State Board of Parole*, 500 F.2d 925, 930 n.4 (2d Cir.), vacated and remanded as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015 (1974).

[8] Lawrence Kavanaugh, Assistant Director of Field Operations of the Department of Corrections, indicated in his testimony that the Board's statements of reasons and facts (given since September, 1975) are prepared in accordance with New York Corrections Law § 214. He also stated that an inmate whose application has been denied may apply to the Chairman of the Parole Board for reconsideration and may indicate in a letter the reasons the original denial should be reconsidered. However, the record is silent on whether this opportunity for reconsideration is made generally known to the inmates.

certified, see *Sosna* v. *Iowa,* 419 U.S. 393, 402-03 (1975), this case is a "suitable exception" to that requirement. *Gerstein* v. *Pugh,* 420 U.S. 103, 110-11 n.11 (1975), *Sosna* v. *Iowa,* supra, 419 U.S. at 402 n.11. Because of the relatively short periods of incarceration involved and the possibility of conditional release there was a significant possibility that any single named plaintiff would be released prior to certification, although this possibility was less substantial than it was in *Gerstein.* As in *Gerstein,* however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues (appellees are represented by the Parole Revocation Defense Unit of the Legal Aid Society). See *Gerstein* v. *Pugh,* supra, 420 U.S. at 110-11 n.11; *Frost* v. *Weinberger,* 515 F.2d 57, 62-65 (2d Cir. 1975); *McGill* v. *Parsons,* 532 F.2d 484, 488-89 (5th Cir. 1976); *Inmates of San Diego County Jail in Cell Block 3B* v. *Duffy,* 528 F.2d 954, 956-57 (9th Cir. 1975). Further, despite the admonition of F.R.C.P. 23(c)(1) that the court shall make the class action determination "[a]s soon as practicable after the commencement of an action," for reasons which are not apparent, almost a year elapsed between appellees' uncontested motion for class action status and the district court's certification. Appellants make no contention on appeal that the certification was improper nor is there any question that the class was properly identified by the district court. See *Indianapolis School Comm'rs* v. *Jacobs,* 420 U.S. 128 (1975) (per curiam). It follows that this case is not moot because the controversy as to the named plaintiffs has been resolved. Because of the relatively short periods of incarceration involved and the possiblity of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate. See *Gerstein* v. *Pugh,* supra, 420 U.S. at 110 n.11; *Sosna* v. *Iowa,* supra, 419 U.S. at 401-02. Furthermore, it is clear that there is a sufficient adversary relationship here to assure proper presentation of the issues. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 752-57 (1976).

Turning to the merits, we must first inquire whether a prisoner's interest in conditional release is sufficient to warrant due process protection. Although the Supreme Court has rejected the notion that every state action having adverse consequences for an inmate automatically raises a question of due process, see, e.g., *Meachum* v. *Fano,* 44 U.S.L.W. 5053 (U.S. June 25, 1976); *Moody* v. *Daggett,* 45 U.S.L.W. 4017, 4020 n.9 (U.S. Nov. 15, 1976), it has left open the issue of whether, and to what extent, parole release procedures may be held to activate due process rights. See, e.g., *Moody* v. *Daggett,* supra, 45 U.S.L.W. at 4020; *Scott* v. *Kentucky Parole Board,* 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976). As the district court noted, however, it is settled in this circuit that a prisoner's interest in prospective parole or "conditional entitlement" is entitled to due process protection: "Whether the immediate issue be release or revocation the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F.2d 925, 928 (2d Cir.), vacated and remanded as moot sub nom. *Regan* v. *Johnson,* 419 U.S. 1015 (1974). See *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Holup* v. *Gates,* —— F.2d ——, slip op. at 5881 (2d Cir. Oct. 20, 1976); *Haymes* v. *Regan,* 529 F.2d 540 (2d Cir. 1975).[9]

New York Penal Law § 70.40(2) provides inmates a "justifiable expectation rooted in state law," *Montanye* v. *Haymes,* 44 U.S.L.W. 5051, 5052 (U.S. June 25, 1976), that they will be conditionally released if they meet Board standards. See New York Correction Law § 827. Although the potential deprivation involved in an administrative decision is an appropriate factor to consider in determin-

[9] As noted by Justice Stevens in his dissent in *Scott* v. *Kentucky Parole Board,* supra, the circuits are in conflict on this issue. See 45 U.S.L.W. at 4011 n.1, and cases cited therein; *Mower* v. *Britton,* 504 F.2d 396, 397 (10th Cir. 1975) (dictum).

ing the amount of process due, see *Mathews* v. *Eldridge,* 424 U.S. 319, 335, 341 (1976), it is the *nature* of the interest sought to be protected from official action that determines whether due process attaches. See *Meachum* v. *Fano,* supra, 44 U.S.L.W. at 5056. Whether labelled "conditional release" or "parole" the nature of the interest at stake in this case is the same: conditional freedom versus incarceration. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* supra, 500 F.2d at 928; cf. *Wolff* v. *McDonnell,* supra, 418 U.S. at 556-57.

Having determined that due process attaches, the question remains of how much process is due. In this inquiry we are guided by the Supreme Court's observation that identification of the specific dictates of due process generally requires consideration of three factors: 1) the private interest involved; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and 3) the public interest in maintaining existing procedures, including the function involved and the fiscal and administrative burdens entailed in additional or substitute procedures. See *Mathews* v. *Eldridge,* supra, 424 U.S. at 334-35.[10]

Turning first to the inmate's liberty interest we note that this court and others have distinguished between the inmate's interest in continued conditional freedom (involved in the parole revocation decision) and his anticipation or hope of freedom (involved in the parole release decision), see *Morrissey* v. *Brewer,* 408 U.S. 471, 482 n.8 (1972); *Gates* v. *Holup,* supra, slip op. at 5885; *Childs* v. *United States Board of Parole,* 511 F.2d 1270, 1286 (D.C.

[10] In *Haymes* v. *Regan,* supra, 525 F.2d at 543, this court adopted an almost identical three-pronged balance between "the inmate's interest in the proceedings . . . the 'need for and usefulness of the particular safeguard in given circumstances' . . . (and) any direct burden which might be imposed on the Board" by this requirement, quoting *Frost* v. *Weinberger,* supra, 515 F.2d at 66, quoted in *Holup* v. *Gates,* supra, slip op. at 5886.

Cir. 1974) (Tamm, *J.,* concurring); in the latter instance the broad discretion afforded the Board necessarily lessens the required content of due process. See *Haymes* v. *Regan,* supra, 525 F.2d at 543.[11] We think a similar distinction can be drawn between the inmate's interest in conditional release and parole. As the state points out, applications for conditional release are less likely to be granted than are applications for parole; accordingly, the conditional release applicant's expectation of liberty is less justified and his interest is correspondingly less substantial. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* supra, 500 F.2d at 928.[12] Further, because the conditional release applicant's sentence will almost always be shorter than that of the parole applicant, he will ordinarily have less at stake.[13] Thus, although the inmate

[11] In *Childs* v. *United States Board of Parole,* supra, 511 F.2d at 1282, in a related context the court stated:

> "There is a substantial difference on the due process issue between a finding of serious disciplinary action leading to loss of good-time credits, involved in Wolff, and denial of an application for parole. The broad discretion of the Board in the latter instance lessens the content of require due process . . ."

[12] In *Johnson* the court relied, in part, upon 1972 Board statistics showing that 75.4% (4,412) of the inmates applying for parole were successful; these statistics strengthened the court's conclusion that the inmates had a cognizable liberty interest in parole. Board statistics for 1974, however, reveal that only 29% (746) of the applicants seeking conditional release were successful.

[13] See notes 1, 2 and 3, and accompanying text, supra. Appellees point out that the consequences of denial of conditional release to an inmate serving the maximum definite sentence (2 years, release possible after 60 days) and the consequences of denial of parole to an inmate serving the minimum indeterminate sentence (3 years, release possible after 1 year) almost overlap (22 months versus 24 months additional incarceration). However, since the court has only been given hypotheticals, and not facts, it can only presume what seems obvious: that the great majority of cases will not fall at the extremes presented in appellees' hypotheticals and thus in the majority of cases the consequences of an adverse decision of the Board will be far greater for the parole applicant than for the applicant for conditional release.

seeking conditional release has a significant interest in the Board's decision, we think his interest less substantial than that involved in parole revocation and, perhaps, release. Accordingly, although we reject the state's contention that these considerations negate the existence of an interest sufficient to warrant due process protection, we adopt the position that the demands of due process should be less stringent. Compare *Mathews* v. *Eldridge,* supra, 424 U.S. at 341-43.

The district court found the administration of the conditional release program to be chaotic. Obviously, the program is almost meaningless to an inmate if he is unable to obtain even a preliminary interview after six months at Rikers Island,[14] and such administration amounts to an arbitrary denial of the statutory entitlement. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge,* supra, 424 U.S. at 333, quoting *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965); see *Moody* v. *Daggett,* supra, 45 U.S.L.W. at 4020-22 (Stevens, *J.*, dissenting).[15] Since the testimony at trial indicates that applications are currently processed within 60-90 days of arrival at Rikers Island, the district court's order requiring that applications for conditional release be processed in order of eligibility and within 60-90 days of an inmate's arrival imposes little, if any additional administrative or fiscal burden. However, although we agree in principle with the district court's order, as a practical matter it may be impossible for the state authorities to process applications in strict order of eligibility and still maintain a fair and rational conditional release program.[16] Thus,

[14] See note 5, supra.

[15] The district court also correctly noted that the state legislature must have intended reasonably prompt action on conditional release applications.

[16] In order to clarify some confusion evident at oral argument we note that by "eligibility" the district court obviously meant

for example, in processing applications the state authorities may wish to take into account the fact that an application has been filed in a tardy fashion. Because we view the court's order as an effort to deal with the exigencies at hand and not an attempt unnecessarily to tie the hands of the state authorities, we understand the court's mandate to require the processing of applications in strict order of eligibility only to the extent that this is practical and fair to the applicants. The state authorities thus remain free to fashion their own procedures to deal with administrative problems that may arise in the application of the program as long as applications are processed in a timely and rational fashion.

We have no difficulty with the district court's requirement of a statement of reasons and facts. The funda-

statutory eligibility. An inmate becomes "eligible" for release if he is serving one or more definite sentences with an aggregate term of at least 90 days and has served 60 days, including jail time as provided by statute. See notes 1 and 2, supra. It should be obvious that an inmate who may become eligible for conditional release and has served 20 days should ordinarily have his application processed before that of an inmate who has served only 10 days. Similarly, inmates who arrive with jail time should ordinarily be processed before inmates who arrive without such time; in any event, the staff has up to 90 days from the point at which an inmate arrives at Rikers Island within which to process his application (assuming the inmate falls within § 70.40(2) and desires to participate). While we appreciate Judge Van Graafeiland's concern with excessive involvement of the federal courts in state prison administration, any attempt to remedy unconstitutional action on the part of state prison officials must necessarily involve some "interference with the routine operation of a state penal system." We merely hold that the district court properly exercised its traditionally broad equitable discretion in shaping an order to eliminate the arbitrariness inherent in a system where applications are processed "at random." See *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944). Although problems may yet arise in the application of the conditional release program (such as how to treat tardy applications), the state authorities are in the best position to deal with such problems as they come up. This court simply cannot predict all the difficulties yet to be encountered and shape its order accordingly; to do so would unnecessarily strait jacket the state authorities.

mental nature of such statements in parole release decisions is discussed by Judge Mansfield in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* supra, and was noted again in *Haymes* v. *Regan,* supra, 525 F.2d at 543-44, and *Holup* v. *Gates,* supra, slip op. at 5886-87. It is sufficient here to note that the same considerations apply to conditional release decisions and to emphasize that, particularly where an administrative body is vested with such large discretion, a requirement of a statement of reasons and facts is necessary to protect against arbitrary and capricious decisions or actions grounded upon impermissible or erroneous considerations. See *United States ex rel. Johnson* v. *Chairman, New York State Parole Board,* supra, 500 F.2d at 929. Such statements must provide the inmate with the grounds for a decision to deny or defer his application for conditional release, and the essential facts upon which the Board relied. See *Haymes* v. *Regan, supra,* 525 F.2d at 544. As the Board alleges that it has been voluntarily complying with this requirement since September, 1975, the court's order should constitute no additional burden.[17]

Given the foregoing procedural safeguards, and keeping in mind the interest at stake and the additional administrative and fiscal burdens involved, we conclude that a personal hearing before a member of the Board is not constitutionally mandated. Unlike a parole revocation pro-

[17] Of course, voluntary compliance does not make a controversy moot where, as here, there is a possibility of recurrence of the wrongful conduct. *Allee* v. *Medrano,* 416 U.S. 802, 810-11 (1974); *United States* v. *W.T. Grant Co.,* 345 U.S. 629, 632-33 (1953). We also reject appellants' suggestion that this portion of the court's holding was unnecessary because New York Correction Law § 214 (6) provides for written statements of reasons and facts. Section 214 by its terms applies only to parole decisions. Moreover, we fail to see how appellants can rely on that part of section 214(6) which requires written statements and then ignore the language in the same section indicating that such statements are to be preceded by a hearing before a three-member panel of the Board—a procedure reserved for parole decisions.

ceeding, the procedures used in the conditional release program are not adversary in nature; rather, both the Board and the inmate have an interest in obtaining the inmate's release. See *Gagnon* v. *Scarpelli,* 411 U.S. 778, 784-85 (1973); *Hyser* v. *Reed,* 318 F.2d 225, 237, 242 (D.C. Cir. 1963) (en banc), cert. denied, sub nom. *Thompson* v. *United States Board of Parole,* 375 U.S. 957 (1963). Unlike parole revocation, the conditional release decision will rarely, if ever, involve complex factual disputes in which the inmate may have to prove himself innocent of criminal behavior or show factors in mitigation. See *Morrissey* v. *Brewer,* supra, 408 U.S. at 488; *Gagnon* v. *Scarpelli,* supra, 411 U.S. at 786-88; *Carson* v. *Taylor,* —— F.2d ——, slip op. at 5075, 5085 (2d Cir. July 22, 1976). Nor will conditional release decisions involve questions of serious violations of discipline in maximum security institutions as in *Wolff* v. *McDonnell,* supra, 418 U.S. at 558-63. Under the district court's order, applications for conditional release must be processed within 90 days of an inmate's arrival at Rikers Island. The Board's decision is primarily influenced by the applicant's prior record, the nature of his offense, his institutional adjustment, and his future plans. Thus, given the short span of time between arrival at Rikers Island and the release decision and the fact that the parole officers make no independent investigations, the information upon which the Board acts must necessarily be obtained in large part from available presentence reports and the inmate interviews. Under New York Criminal Procedure Law § 390.50 defendants are given access to their presentence reports prior to sentencing and thus have an opportunity to learn of and correct any inaccuracies. Appellees do not claim that there is any motive for, or evidence of, fabrication in the parole officers' relation of the inmate interviews. Compare *Carson* v. *Taylor,* supra, slip op. at 5085. Thus, the risk of the Board basing its decision on erroneous information is relatively minimal and the record simply does not support allegations that misin-

formed decisions have been prevalent in the past. Compare *Holup* v. *Gates*, supra, slip op. at 5887. The requirement of a statement of reasons and facts should serve to protect the inmate from arbitrary decisions, or those based on impermissible grounds, see *Haymes* v. *Regan*, supra, 525 F.2d at 544; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, supra, 500 F.2d at 929; further, if a decision has no basis in an inmate's file, judicial review should be available. *Holup* v. *Gates*, supra, slip op. at 5888.

Although a personal interview might provide the inmate with a better opportunity to present his case to the Board, we think that, under all the circumstances, the inmate has sufficient opportunity to present the relevant facts through the parole officer and by his own submission of any information helpful to his cause.

We cannot ignore the significant additional financial and administrative burdens necessarily involved in providing in-person hearings to all conditional release applicants. In 1974 there were some 2578 applications for conditional release by inmates at 62 local penitentiaries and jails throughout the state; 1200 of these applications were made by inmates at Rikers Island. The Board, which currently consists of 11 members, conducts about 15,000 hearings per year in panels of three. Even if the impact of a decision of this court requiring conditional release hearings could be limited to the class of inmates at Rikers Island, "[w]e only need say that experience with the constitutionalizing of government procedure suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Matthews* v. *Eldridge*, supra, 424 U.S. at 347. Weighing all of these factors, we conclude that due process does not require that a personal appearance before a member of the Board be given to each conditional release applicant.

Finally, we find no merit in appellees' claim that the difference in procedures between inmates seeking conditional release and inmates seeking parole violates the Equal Protection Clause. See New York Correction Law § 214. Equal protection does not require that all procedural protections be applied in the same fashion without regard to the length of internment or the nature of the crime involved. See, e.g., *Marshall* v. *United States*, 414 U.S. 417, 422 (1974); *McGinnis* v. *Royster*, 410 U.S. 263, 269-70 (1973); *Baldwin* v. *New York*, 399 U.S. 66 (1970). Compare *Baxstrom* v. *Herold*, 383 U.S. 107, 110-11 (1966).

Accordingly, we affirm the order of the court except as it requires appellants to provide a personal appearance before a member of the Board to applicants for conditional release.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I concur in that portion of the majority opinion which holds that appellees are not entitled to appear personally before the Parole Board.

Since August 1975, the State has been furnishing rejected applicants for conditional release with written statements of the reasons for their rejection. For this reason, and because this Court has already spoken on this issue in the related field of parole, *see, e.g., United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated and remanded as moot sub nom. Regan* v. *Johnson*, 419 U.S. 1015 (1974), I also concur with the majority that such statements should be furnished.

As to the balance of the order appealed from, I would reverse. It requires the State to institute appropriate procedures to "insure" that conditional release applications be processed in order of eligibility and mandates that they be processed within 60-90 days of the arrival of an inmate on Rikers Island. In thus holding that the State may not process one prisoner's application until after it has processed the application of another who will become eligible

for release one day earlier, the District Judge has elevated the petty to constitutional status. Ignoring the admonition of the Supreme Court that "federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States", *Meachum* v. *Fano,* 44 U.S.L.W. 5053, 5057 (U.S. June 25, 1976), he has created another procedural morass for already beleaguered prison officials and created inequities in the process.

If constitutionality is to be equated with fairness, an unjustifiable equation under the law, *see Meachum* v. *Fano, supra,* at 5056, fairness to all should be the criterion. A plan is not fair which requires a prisoner, who makes prompt application for release, to sit patiently by until after the application of a less diligent inmate, albeit one with earlier eligibility, is passed upon by the Commission. A procedure is not just which mandates that an application, which is complete and untroublesome, gather dust on the shelf until information is compiled to complete the file of a more controversial applicant. Such Federal interference with the routine operation of a state penal system is not compelled by the Fourteenth Amendment which, we should occasionally remind ourselves, provides simply that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ."

My colleagues, recognizing the inequities in the District Judge's order, construe it as if it did not contain the word "insure". They say that the procedures which the State is ordered to adopt must require the processing of applications in strict order of eligibility "only to the extent that this is practical and fair to the applicants." I submit that this constitutes not an affirmance but a reframing of the District Judge's order and, with all due respect to my colleagues, merely substitutes one unfortunate consequence of unnecessary federal interference for another. It is one thing to direct the State to promulgate rules which require processing in order of eligibility only to the extent that it is "practical and fair"; it is quite

another thing to promulgate them. If it is possible for the State to draft rules which will withstand the challenge of indefiniteness, what a Pandora's box they will open for the litigious prisoner who asserts their impractical or unfair application. This infelicitous result, we mandate in the name of Due Process.

My brothers say that, because applications are presently being processed within 60-90 days, the order which requires that this be done imposes little, if any, additional administrative or fiscal burden on the State. Of course, this is not the proper test to be applied in determining whether a Federal Court order should issue. The question, simply put, is whether the Constitution forbids the lapse of 91 days in the processing of applications. In his dissenting opinion in *Moody* v. *Daggett,* 45 U.S.L.W. at 4020-22, which my brothers cite with apparent approval, Justice Stevens, speaking with regard to parole revocation hearings, said at 4022 n.12:

> I should also make clear that I would not prescribe any inflexible rule that the hearing must always take place within a fixed period.

There is no such inflexible rule in the Constitution.

Asuming that a prisoner has a constitutional right to have his application for conditional release processed with reasonable dispatch, this right cannot accrue until his application is made. The order, which requires that processing be completed within 60-90 days after the inmate's arrival on Rikers Island, completely ignores this fact. The order may well operate to benefit the tardy and troublesome inmate at the expense of his more diligent and deserving brother by requiring overworked parole officers to lay the latter's easily processed application aside while they meet the court-imposed deadline for the tardy troublemaker.

Our eagerness to correct asserted wrongs should not blind us to the fact that when we create a right, we also lay the groundwork for a remedy. One would expect that a

right of such constitutional magnitude as to justify delineation by this Court would merit drastic remedial relief. Contempt of court, habeas corpus and actions for damages are remedies which come readily to mind. Woe betide the hapless penal officer who violates an inmate's constitutional rights by processing his application out of order or by failing to process it within the prescribed ninety days. I have in the past expressed my concern about excessive involvement by the federal courts in the operation of state penal institutions. *See McRedmond* v. *Wilson*, 533 F.2d 757, 766 (2d Cir. 1976) (Van Graafeiland, *J.*, dissenting). Those portions of the order which I would reverse illustrate well the basis for my concern.

APPENDIX B

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 4018

GUSTAVE ZURAK, WILLIAM MCAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Defendants.

APPEARANCES:

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CARTER, District Judge

OPINION

I

New York Penal Law Section 70.40(2), applicable only to individuals serving definite sentences, provides:

New York Penal Law Section 70.40(2)

"2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board in accordance with the provisions of the correction law.

"Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance."

Under New York Law definite sentences are those that do not exceed one year. The maximum penalty for a crime classified as a misdemeanor is a term of imprisonment of one year or less, New York Penal Law § 70.15, and persons guilty of Class D & E felonies may be sentenced to terms of imprisonment of one year or less, *Id.* § 70.00 (4). These

are definite sentences. Those of more than one year's imprisonment are indeterminate under New York Law, with a minimum of three years' imprisonment and a maximum of life imprisonment, and may be imposed only for crimes classified as felonies. *Id.* § 70.00. A definite sentence is served in a county or regional correctional institution, while an indeterminate sentence must be served at a state prison. *Id.*, § 70.20.

The instant action attacks the constitutionality of the New York Penal Law as applied and seeks a preliminary injunction granting plaintiffs and the class they represent the right to appear in person before the Parole Board ("Board") in connection with the Board's consideration of their conditional release applications; mandating expedited consideration of such applications in conformity with the statutory eligibility date; requiring the Board to provide written reasons for their determinations denying conditional release, and requiring that the Board indicate in writing the information relied upon in reaching their conclusions.

Plaintiffs are all inmates serving definite sentences of more than 90 days in the New York City Correctional Institution For Men on Rikers Island and who are now or will be eligible for conditional release pursuant to New York Penal Law § 70.40 (2), and New York Correction Law § 827. They seek class action determination which is unopposed.

At the hearing on the matter, Gustave Zurak, Benjamin Santiago, Salvatore Zambuto, Maitland Jones, Willie Mack and Martin Halpern—plaintiffs or witnesses for the plaintiffs—testified. Their testimony with respect to conditional release procedures at Rikers Island was generally to the same effect and may be summarized as follows. Shortly after arrival on Rikers Island, the witnesses were advised of the conditional release program, filed an application for release under the program, and were interviewed by a parole officer. The witnesses had not been given the op-

portunity to see what was in their files, and after the interview heard nothing further for a long time.

Zurak was notified in March, 1975, some four months after he filed his application that it had been denied. No reasons were given. Halpern applied in May, 1975, and in September was notified that his application had been deferred until November. On December 1, 1975, Halpern was offered conditional release but turned it down since his incarceration would end in any event before February, 1976. Santiago applied for conditional release early in June, 1975, was not interviewed until November, 1975, and as of the time of the hearing had heard nothing further. Zambuto applied for conditional release in April, 1975, and was notified in July, 1975 that his release had been denied. Jones had been at Rikers Island since May, 1975, but was not assigned to the New York City Correctional Institution For Men until June. He immediately applied for release, but some six months later had not yet been called for an interview with the parole officer.

The plaintiffs' version of events was verified in substantial part by the state's witnesses. Raymond E. Dorsey, Supervising Officer on Rikers Island has responsibility for administering the conditional release program. He and his staff endeavor to have the conditional release program explained to all potential eligibles, i.e., to inmates serving 91 days or more, within the first week of their arrival at the institution. The eligible inmates are asked if they wish to make application for conditional release, and a record of those who wish to apply and those who do not is kept. Thereafter, a parole officer interviews the willing applicants. He takes down all information the inmates wish to provide, and based on what he is told during the interview, and on information in the inmate's file, a report is prepared and presented to the parole board "as soon as possible." The report of the parole officer includes a personal or social history of the inmate based on information gleaned from the inmate or contained in the probation

report. Thus, the report includes information relative to the inmate's residence on release, job prospects, the inmate's sentence, offense, the amount of jail time served, and the date his sentence is to terminate, a summary of his prior record, and the officer's evaluation. The parole officer does no independent investigation and "makes no strong recommendation for or against." It is left pretty well up to the Commissioner to make a decision (Tr. 169). These reports, along with the inmates' files, are brought to the main parole board office in New York City each Friday. It should be noted that since September, 1975, each denied or deferred application is accompanied by a written statement of reasons for the denial or deferral.

In 1974, 1,200 applicants sought conditional release. There are no memoranda or other written guidelines outlining how interviews are to be conducted. Nor are there any practices or regulations establishing the order in which arriving applicants are to be interviewed. It is done on a random basis without regard to amount of jail time served prior to sentence, and without regard to the date an inmate's sentence is to terminate. The interviewing officer does not show the contents of the inmate's file to the applicant. The Parole Commissioners acting on the applications do not make their decision pursuant to any written guidelines or criteria. It is all "an individual decision." Officer Dorsey testified that the Commissioners take into account the applicants' prior record, the nature of the instant offense, institutional adjustment and future plans and are primarily influenced by these factors in making their determinations. The Commissioners do not see the inmate and do not consult with the parole officer who interviewed the applicant and who filed a report on his application. Dorsey testified that it was impossible for his staff to process conditional release applications so that they could be submitted to the Parole Board within the 60-day period of eligibility prescribed by the statute, since the backlog of applications was too great. His estimate was that the parole officers submitted their reports to the Parole

Board between 60-90 days—or 30 days after the statute provides that conditional release may be granted.

II

Class Action Determination

Plaintiffs seek to pursue this action on their own behalf and on behalf of all others similarly situated. The putative class consists of all inmates incarcerated at the New York City Correctional Institution for Men on Rikers Island who are eligible or will be eligible for conditional release. The testimony indicates that the number of eligible inmates on Rikers Island who apply each year for conditional release is approximately 1,200. That number (and the class of eligible applicants designated by plaintiffs necessarily exceeds that 1,200 figure) clearly meets the test of numerosity under Rule 23(a)(1), F.R.Civ.P. *See, e.g., Robertson* v. *National Basketball Ass'n,* 389 F. Supp. 867 (S.D.N.Y. 1975); *Davis* v. *Avco Corp.,* 371 F. Supp. 782 (N.D. Ohio 1974). Moreover, there is a factual nexus linking all members of the putative class, and the impact of the implementation of § 70.20(2) on them as the statute's intended beneficiaries is the same. Thus, the test of common questions of law and fact is met. F.R.Civ.P., Rule 23(a)(2). *See, e.g., United States ex rel. Walker* v. *Mancusi,* 338 F. Supp. 311, 315-16 (W.D. N.Y. 1971), *aff'd on other grounds,* 467 F. 2d 51 (2d Cir. 1972). The claims being asserted—the haphazard and chaotic administration of the conditional release program on Rikers Island, the absence of written guidelines as criteria for those with authority to grant or deny conditional release, denial of the right to a personal appearance before the Commissioner—meet the test of typicality, F.R.Civ.P., Rule 23(a)(3). *See, e.g., Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed,* 496 F. 2d 1094 (2d Cir. 1974). Finally, the class is fairly and adequately represented by plaintiffs and their counsel.

Accordingly, this action is maintainable as a Rule 23(b)(2) class action on behalf of all inmates at the New York City Correctional Institution for Men on Rikers Island who are now or will be eligible for conditional release pursuant to New York Penal Law § 70.20(2).

III

It is settled in this circuit that a "prisoner's interest in prospective parole or 'conditional entitlement'" must be accorded due process protection. "Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 500 F. 2d 925, 928 (2d Cir.), *vacated and remanded sub nom. Regan* v. *Johnson,* 419 U.S. 1015 (1974). The statutory grant is clear and is stated in unambiguous language entitling those inmates serving definite sentences of more than 90 days to apply for conditional release which may be granted at the discretion of the Parole Board and subject to such conditions as the Parole Board imposes. New York Penal Law, § 70.40(2).

The state makes two arguments. First, it alleges that the "substantial interest" in the grant of parole found to exist in *Johnson* is not present with regard to the conditional release applicant. Parole Board statistics for 1972 on which the finding of a substantial interest was found to exist in *Johnson* showed that 75.4% of the inmates coming before the Board were granted parole. The 1974 statistics, however, revealed that of 2,578 conditional release applicants, only 746, or less than 29%, were granted release. Accordingly, the state argues that these statistics hardly give rise to any substantial expectation of release.

The state further argues that plaintiffs' due process rights must be viewed as minimal at best, since their incarceration must necessarily terminate within one year. Thus, defendants contend, while those serving indeter-

minate sentences of three years or more, who are eligible for parole, are granted a hearing before the Parole Board, plaintiffs' minimal due process entitlement is adequately met under present procedures.

At the hearing, Joseph J. Salo, Executive Secretary to the New York State Parole Board stated that parole hearings are explicitly required by state law and no hearing is held on conditional release applications because there is no statutory requirement that these applicants be granted a hearing. In colloquy with the court, Mr. Salo admitted that he could see no difference for such disparate treatment other than the strict requirement of the statute as to why a hearing should be held for those eligible for parole and not held for those eligible for conditional release. He added that "the only difference is that in '74 I don't know whether there were 25 or 26 hundred applicants for conditional release [s]pread out over 62 counties" (Tr. 136), and that the members of the Parole Board could not travel over the whole state.

The evidence at the hearing demonstrates that present administration of the conditional release program on Rikers Island is chaotic. The applications are not processed in any order designed to insure submission to the Parole Board in at least a rough approximation to the dates of eligibility (that is, those with earlier eligibility dates being submitted to the Board before those with subsequent eligibility dates). The testimony also made clear that the parole staff deemed it impossible to get the applications processed and before the Board within 60 days of the inmate's incarceration. The statute requires only that the application be considered "at any time after service of sixty days." New York Penal Law § 70.40(2). I do not read the statute as necessitating that the conditional release application be given Parole Board consideration on the 60th or 61st day, but only that procedures be instituted which will result in such consideration within a reasonable time after the 60th day when the inmate becomes eligible for

conditional release. Since the term to be served is a maximum of one year, the legislature must have intended and contemplated reasonably prompt action on these applications by the parole staff and by the Parole Board. Raymond Dorsey who is in charge of the conditional release program at Rikers Island testified that he needed 60-90 days to process applications. Due process is not an inflexible concept. *See Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Provided procedures are adopted which will insure that applications are processed in order of eligibility, the 60-90 day period for processing the applications seems adequate, but any delay beyond 90 days appears to be unreasonable.

The conditional release procedures currently being employed, however, do seem clearly to violate basic due process requirements. Until only recently, the Parole Board's practice was to deny applications without giving reasons for such denials. Since September, 1976, new procedures have been instituted and the inmate is given, in a written statement from the Commissioner who reviewed his application, the reasons for denial of his release application. At the hearing, it was merely indicated that written reasons now accompany the denial of each application. Insofar as the current procedure requires the Commissioner to include in each application which is denied a specific and meaningful statement of reasons and the facts underlying the denial, due process requirements have been met. *Haymes* v. *Regan,* 525 F. 2d 540, 544 (2d Cir. 1975).[1]

That brings us to the only remaining issue—whether applicants for conditional release must be accorded a hearing before the official who decides on such applications. Here the state has, pursuant to § 70.20(2) of the New York Penal Law, extended an expectation of liberty, if sought, to those inmates serving definite sentences. Due process unquestionably requires that fair procedures be utilized to determine whether that expectation is to be realized. *Franklin* v. *Shields,* 399 F. Supp. 309, 316 (W.D. Va. 1975). The testimony adduced at the hearing

demonstrated unequivocally that the conditional release applicant is not receiving fair treatment under present procedures. He is interviewed by a parole officer, but because of staff constraints, the parole officer conducts no independent investigation, instead relying on what the inmate tells him and what information is in the file from the probation authorities. He makes a report which is submitted to the Parole Board; yet, the parole officer is never consulted by the Commissioner and, indeed, since he does not know the inmate-applicant, the Commissioner could not seem to be helped by the parole officer's presence. The inmates are not given access to their conditional release files, which in itself seems to be a denial of due process. *See, e.g., United States ex rel. Carson* v. *Taylor,* —— F. 2d ——, Civil No. 1029 (2d Cir., July 22, 1976), holding, *inter alia,* that due process requires that a parolee be afforded access to documents that will be introduced against him at a revocation hearing, unless the Parole Board meets the burden of establishing good cause for their nondisclosure. The lack of such access seems to have led to injustice involving one of the named plaintiffs who had another inmate's records included in his file. The Parole Commissioner is too burdened to be expected on his own to notice such errors (and apparently in this case he did not). The parole officer assumes no responsibility for presenting the inmate's case. As Mr. Dorsey stated, the parole officer's report is neutral and everything is left pretty much up to the Commissioner. Fundamental fairness cannot be achieved under present procedures for processing conditional release applications unless the inmate-applicant is given the opportunity to appear in person before the Board and to discuss his case with the Commissioner.

The state has resisted the right to a personal appearance on applications for conditional release, arguing that the cost of such hearings would be prohibitive, and the demand on the Commissioner's time unduly burdensome

given the present size of the Board, the number of conditional release applications processed annually, and the already severe constraints on Board members' time by virtue of their other duties. It is clear, however, that neither financial nor administrative difficulties suffice to excuse the state from according basic due process rights to inmates. *See, e.g., Detainees of Brooklyn House of Detention* v. *Malcolm,* 520 F. 2d 392, 399 (2d Cir. 1975); *Rhem* v. *Malcolm,* 507 F. 2d 333, 341 n.20 (2d Cir. 1974).

The trend towards requiring that basic due process safeguards be accorded in parole revocation and grant proceedings is to protect inmates from bureaucratic arbitrariness and caprice, and from actions grounded upon impermissible considerations. *See, Haymes* v. *Regan, supra,* 525 F. 2d at 544; *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole, supra,* 500 F. 2d at 929; *see also, Cardaropoli* v. *Norton,* 523 F. 2d 990, 998-9 (2d Cir. 1975); *Parole Release Decisionmaking and the Sentencing Process,* 84 Yale L.J. 810 (1975). Moreover, unless we are resigned to accept recidivism as a universal fact of incarceration, the public interest is furthered by adopting orderly and fair procedures for dealing with a prisoner's expectation of liberty.

The state's contention is that a 29% ratio of success for conditional release applicants as demonstrated by 1974 statistics, as against 75% for parole applicants, as found in the *Johnson* case, *supra,* does not give rise to an expectation warranting due process protection. It is the New York Penal Law § 70.40(2) that posits in the inmate serving a definite sentence, an expectation of freedom after sixty days of incarceration, and that expectation cannot be quantified as warranting or not warranting due process protection based upon fulfillment percentiles pursuant to Parole Board action. Thus, the conclusion in *Johnson* that procedures for the grant of release from incarceration as well as revocation of release must be clothed with some degree of due process is applicable to conditional release applicants as well as parole applicants.

Accordingly, with respect to plaintiffs' claims for injunctive relief, it is hereby ordered that:

(1) Defendants institute appropriate procedures to insure that conditional release applications be processed in order of eligibility. Applications are to be processed within 60-90 days of the arrival of an inmate on Rikers Island;

(2) The Board is to provide to each inmate whose application for conditional release is denied or deferred, a written statement of the reasons for such denial or deferral, together with a written statement of the facts relied on in reaching the decision.

(3) Applicants for conditional release are to be accorded the right to a personal appearance before the Commissioner or Commissioners responsible for deciding on the disposition of his application.

So ORDERED.

Dated: New York, New York
July 30, 1976

ROBERT L. CARTER
Robert L. Carter
U.S.D.J.

FOOTNOTE

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[1] It should be noted that § 214 of the New York Correction Law was recently amended by the addition of subdivision six to require the Parole Board to inform each prisoner denied parole of "the facts and reason or reasons for such denial."